

Legal Alert – September 2011 – Sovereign Investment Authority Act, 2011

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Legal News

To address the insufficient housing stock associated with the efficient implementation of the new Tenancy Law in Lagos State, the Lagos State Government has introduced a Home Ownership Mortgage Scheme to assist first-time home buyers, resident in Lagos State, the opportunity to own their own homes.

Also, a Housing Arbitration Rules, to be read in conjunction with the Lagos State Arbitration Law 2009, have also being published to cater for any dispute arising from the Lagos Home Ownership Mortgage Scheme.

For more details on the above, you can visit the Lagos State website, www.lagosstate.gov.ng

Legal Alert – Nigeria Sovereign Wealth Fund - Introduction

The Nigerian Government has passed into law the Sovereign Investment Authority (Establishment, Etc.) Act, 2011 (“NSWF Act”), to among other things, establish a Nigerian Sovereign Investment Authority. This Authority has the responsibility to receive, manage and invest in diversified portfolios the medium and long-term revenue of the Federal Government of Nigeria, the 36 State Governments, the Federal Capital Territory, all the Local Government Areas and all the Area Councils in Nigeria.

The NSWF legislation is necessitated by the depletion and the non-renewable nature of the hydrocarbon resources in Nigeria, and the need to develop critical infrastructure that would attract investment and diversify the Nigerian economy.

Nigeria Sovereign Investment Authority – Establishment

In addition to the objective stated above, the Nigeria Sovereign Investment Authority (“NSIA”) is established to acquire, hold and dispose of movable and immovable assets for the purpose of building a savings base for the Nigerian people, in addition to enhancing the development of infrastructural facilities in Nigeria, and further, providing a stabilisation support to Nigeria in times of economic stress.

Independent Authority

The NSIA is an independent authority that is not subject to the direction or control of any person or body except as provided for in the NSWF Act.

Some of the measures designed to protect the assets of the Authority include the statutory provision that the assets of the Authority are to be diversified while no Asset Manager to the Authority shall be appointed or act as its Custodian at the same time in respect of the assets of the Authority and or of the Fund. In addition, one or more Custodians are to be appointed for the investments held by the Authority.

Funding of the SWF Authority

The take-off funds to be managed by the Authority is the Naira equivalent sum of \$1,000,000,000 (One Billion United States Dollars). This sum is to be contributed by the Federal Government, the State Governments, the Federal Capital Territory, the Local Governments and the Area Councils in the pro-rata basis of their share of the total Revenue from the Federation Account as provided for in the Allocation of Revenue (Federation Account, etc) Act, 2004.

Subsequent funds to be managed by the Sovereign Wealth Authority are to be derived from the Residual funds in the

Federation Account with the derivation portion of the revenue allocation expressly excluded from this arrangement.

The various tiers of governments in Nigeria, as owners of the sovereign wealth fund, are not allowed to transfer, redeem, assign, dispose, sell, mortgage, pledge or otherwise encumber any of their interest in the SWF.

Insurance, Indemnities, Taxation, etc

The Directors of the SWF Authority are protected by insurance policies and indemnified in line with best International Standards whilst they carry out their duties in accordance with the NSWF Act.

The provisions of the Public Officers' Protection Act, which provides, among other things, that law suits against public officers can only be commenced within three (3) months after the act, neglect or default complained about, is also available to the SWF Authority, its Directors, Board and officers.

On the matters of taxation, the SWF Authority, its wholly owned subsidiaries and affiliates are exempted from the provisions of any and all taxes, imports and similar fiscal laws and regulations enacted by any tier of government in Nigeria.

The employees of the Authority and its wholly owned subsidiary are however liable to pay personal income tax and claim any tax benefits as provided for in any international treaty to which Nigeria is a signatory.

The SWF Authority and any Financial Instrument created by this Authority in furtherance of its statutory objectives are also exempted from the provisions of the Investments and Securities Act 2007, and the Banks and Other Financial Institutions Act 2004, and any amendments to these legislation from time to time shall not apply to the SWF Authority.

The provisions of the NWSF Act shall prevail where any law or enactment relating to or similar to its operations are inconsistent with the NSWF Act.

Constitutionality of Nigeria Sovereign Investment Authority Act

The legislative powers of the Federal Republic of Nigeria is vested in the National Assembly who have the powers to legislate on the matters enumerated in the Exclusive Legislative List as set out in Part 1 of the Second Schedule of the 1999 Constitution (as amended).

Section 80 (1) of the 1999 Constitution (as amended) provides that all revenues received or raised by the Federal Republic of Nigeria shall be paid into one Consolidated Revenue Fund for the benefit of the entire Federation of Nigeria. The exception to this provision is where by a Law passed by the National Assembly, a specific public fund is created for a specific public purpose, like the Sovereign Investment Authority to manage Nigeria's Sovereign Wealth Fund.

Conclusion

Opposition to the constitutionality or legality of the NSWF Act will remain misplaced until the 1999 Constitution (as amended) is further amended to devolve more legislative authority, responsibilities and revenues on the States and Local Governments Areas as should be the case in a Federal System of Government, as opposed to the current "Unitary" System of government in Nigeria.

Pending the further amendment to the 1999 Constitution, to be reflective of a true Federal system of government, the method of appointments and representations on the Council and the Board of Directors of the Sovereign Investment Authority of Nigeria needs to reflect true independence and the protection of the contributors from a very strong Federal Government or a conniving group of State Governments. The machinery to enshrine good corporate governance and prevent conflict of interest in the entire present structure cannot be guaranteed until the 1999 Constitution (as amended) and the NSWF Act are amended.

The last comment is that the NSWF Act does not provide for a transparent incentive package for the managers of the fund as is the practice in the private sector. The likelihood of public

sector bureaucracy and non-meritocracy could therefore erode this fund.

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